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No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1922

MALCOM DOUGLAS *and* BERT C. ROSS,
Prosecuting Attorney and Deputy Prosecuting Attorney for King County,

Appellants,

vs.

LEON NOBEL,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

CASSIUS E. GATES,
901 Alaska Bldg.,
Seattle, Wash.

BROWDER BROWN,
J. W. A. NICHOLS,
Solicitors for Appellee.

Office: 201 Provident Building,
Tacoma, Wash.

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STATEMENT OF THE CASE

We concede the correctness of counsel's opening statement in their argument,—that their specifications of error involve but one question, to-wit: the constitutionality of Section 8416 of Remington's 1915 Code.

The District Court held such to be the question

at issue, and based its decision on the unlimited authority conferred or attempted to be conferred on the board in the examinations for licenses; and finding such authority to be without limit, rule or regulation of any kind or degree as to such examinations, held the statute so far as it relates to examinations to be inoperative and void (Record p. 29).

Examination of the statute, quoted by appellants on Pages 4 and 5 of their brief, will disclose the correctness of the District Court's conclusion as to absence of limitations on the power of the Board. Analysis of the statute is best given by quoting from the Court's opinion:—274 Fed. Rep. 672-679 (Record p. 20):

> "There is no regulation in the statute under consideration concerning the subjects upon which the applicants shall be examined; no regulation as to percentages required to pass examination; no regulation as to whether the examination shall be confined to the theory of dentistry; whether written or oral; or whether the applicants proficiency shall be determined by requiring him to demonstrate his skill with the tools and materials of his profession, or whether the examination may include both methods. In fact the letter of the statute does not even command or direct that the examination shall relate to his qualifications to practice dentistry. There

> is no requirement even that the board shall find the applicant competent and qualified in all or any subjects related to his profession, and for that matter, no requirement that they shall find him qualified as to subjects correlated as unrelated to his profession. No tests for the determination of his fitness, either appropriate or inappropriate. No provision is made for the keeping of any records, either records made by the board or made in the process of examination by the applicant; neither a record for the purpose of review in case of dissatisfaction or complaint, nor as a precedent and guide for future examinations."

And we may add that if further limitations or directions as to the examinations can be suggested, the statute lacks them also.

The Dent Case

Counsel seem to rely largely on the Dent Case (129 U. S. 124) for support of their contention. We suggest with regard to that case:

(1) That the question here in issue, viz: the granting of arbitrary power in examinations, was not raised, discussed, decided nor even mentioned in that case; and (2) that, contrary to counsel's statement, the law of West Virginia was not like the Washington statute,—wholly lacking in regu-

lations and limitations on the powers of the board in matter of examinations, but did contain numerous limitations and regulations in that matter as the following quotation from the law shows, to-wit:

> "Examinations may be made in whole or in part in writing and shall be of an elementary and practical character, and shall embrace the general subjects of anatomy, physiology, chemistry, materia medica, pathology, pathological anatomy, surgery, and obstetrics, but sufficiently strict to test the qualifications of the candidate as a practitioner of medicine, surgery and obstetrics. The provisions of this chapter shall not apply to females practicing midwifery." Laws of West Virginia, 1882, Chap. 93, Paragraph 12.

In view of the above language, we submit that counsel's repeated statements that the statute upon which the Dent case was founded is analogous to our statute is not warranted. But in any event, the only matters in issue in that case were the reputable character of the college from which the defendant had his diploma, and his right to practice because of six years residence in the state instead of the ten years prescribed. These differnces between the Dent case and this case, both in the matter of the statutes involved, and

the issues tendered, show why the District Court could not consider the Dent case as an authority in this case (Record p. 17).

The Yick Wo Case

Counsel seek to evade the force and effect of the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, by quoting after the manner of Satan quoting scripture,—by omitting the pertinent parts. The quotation given means only that this Court would have felt bound to release the petitioners, because of the unlawful and arbitrary manner in which the ordinances in question had been administered, even though the law itself be (were) fair on its face. That such is the true meaning is apparent from the context,—The Court's quotation and approval of the opinion of Circuit Judge Sawyer; and more directly by the express words of this Court by Justice Matthews where he says:

> "For the determination of the question whether the proceedings under these ordinances and in the enforcement of them, are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances, which for that purpose we are required to ascertain and adjudge."

So that by this specific declaration of the Court, the decision was based, not as counsel argues, upon the unlawful acts of the officers alone, but upon the character of the ordinance under which they acted. Their acts were not in violation of any of the terms of the ordinance. That perhaps would have been a matter for the State Courts; but their acts were unlawful because the ordinance itself by permitting such acts, was repugnant to the Federal Constitution; that was the question,—the meaning of the ordinances,—which the Court felt itself called upon "to ascertain and adjudge."

The Thompson Case

Counsel cite the decisions of the Washington Supreme Court in the cases of In Re *Thompson* 36 Wash. 377, and *State ex rel. Brown vs. State Board of Dental Examiners*, 38 Wash. 325, under the rule that the construction of a state statute by the highest Court of the state, will be accepted and followed by this Court. We find no fault with the rule. We affirm, however, that neither in the Thompson case nor in the Brown case, nor in any other case has the Supreme Court of Washington *construed* the dental statute.

The Court did say in both of those cases and in other cases that the dental law is not repugnant to the Federal constitution. But so did the Supreme Court of California in the *Yick Wo* case say that the ordinances there in question were not repugnant to the Federal constitution and cited decisions of this Court in support of their "construction." But this Court quite evidently did not consider the mere declaration that the ordinances were not repugnant to the Federal constitution as a "construction" of the ordinances; for this Court after referring to the California Court's declaration, says:

> "We are consequently constrained at the outset to differ from the Supreme Court of California upon the real meaning of the ordinances in question."

We submit that to construe a statute is to define its terms, or resolve an ambiguity; or, as Webster gives it, to construe is to translate; interpret; explain. And we venture to add as a negative proposition that to construe is not to contradict. To declare a meaning, therefore, which the language of a statute will not warrant, is not a construction of the statute.

If the California Court's declaration that their ordinances were not repugnant to the Federal constitution had been considered by this Court as a construction of the ordinances, of course the rule would have governed and the appeals have been dismissed. So in the cases of the Washington Court in the dental cases. Not in any instance does the Washington Court attempt to define the terms of the statute or remove any ambiguity, or in any manner to translate, or interpret or explain. Instead of attempting to construe the statute, the Court's references thereto are in general language only, which wholly fails of definite application. This is apparent by inspection of the quotations given by counsel in their brief on Pages 11 and 12 where it is stated that "it is equally well established that Courts will compel by mandamus the honest performance of official duty." With this general statement we fully agree; but how can the Court compel performance of a duty that is not prescribed? Will the Court determine the duty and so read into the law something which the legislature had omitted; and so, as often as a question is presented in a new case, read in some new provision? Then in the quotation given, the Court speaks, again in general terms, of the

relief that will be given by the courts if the board shall exercise its discretion with manifest injustice. But discretion means the exercise of given powers within given limits; if there are no limits there can be no discretion. Then the Court speaks of the results if the board shall act arbitrarily, or shall conspire against the rights of individuals. But to act arbitrarily is not, necessarily, to act viciously. To act arbitrarily is simply to act without rule or guide or regulation, and where, as here, no rule or guide or regulation is given, the only action that can be taken is "arbitrary" action. And as to conspiring against the rights of individuals, how can that be where there are no rights defined? Or will the Court deny to the board the exercise of arbitrary powers and determination of rights, and arrogate to itself those functions, which the legislature has attempted to confer on the board. In either case is it not manifest that such action, as said by the District Court in this case, would be the administration of government by men and not by law (Record p. 21).

We submit that the mere decision of a State Court that the state statute is not violative of the Federal constitution is not a "construction" of the

statue, binding on this Court within the rule; otherwise no appeal or writ of error from a State Court on the validity of a state statute would lie. And if this is so, it follows that counsels' argument on the construction of the dental law by the state Court is without foundation.

Prohibiting Arbitrary Power

Counsel state on page 7 of their brief that the District Court concluded that Section 8416 of the dental law granted arbitrary and unlimited power, because it failed to prescribe any standard which should govern the board in giving examinations, "and likewise failed to expressly prohibit arbitrary or unlawful action by the board."

Just what is meant by this last clause we are at a loss to know. But as that, or equivalent expressions, are used eleven times in the course of the brief, it would seem to require some attention.

But first, then, we find no expression in the District Court's opinion in anywise indicating that the conclusion of the grant of arbitrary power was in any manner or in any degree based upon the fact that the stattue "failed to expressly prohibit arbitrary or unlawful action by the board." We have never had our attention called to a Court de-

cision that held a statute void because it failed to expressly prohibit arbitrary action; and we have never had our attention called to a statute or ordinance that did "expressly prohibit arbitrary or unlawful action." And if we may venture an opinion we would say that any statute or section of a statute that should "expressly prohibit arbitrary or unlawful action" would to that extent be while we admit, as stated in Page 17 of the brief, held void for uncertainty of meaning. And so that "it was the contention of appellee * * * that the statute must prohibit arbitrary action * * * by a definition of the officers jurisdiction," we plead not guilty to the charge of contending that the statute must prohibit arbitrary action "by express words of prohibition."

And so we offer an amendment to the caption of counsel's third division of their brief on Page 16, so that the same shall read: "The Fourteenth Amendment does not require express Legislative Prohibition of Arbitrary Action by State Administrative Officers, In statutes Vesting Administrative Powers in Such Officers, *in order to make such statutes conflict therewith.*"

The Lieberman Case

Appellees seem to place their main reliance, however, on their exposition of the *Lieberman* case, 199 U. S. 552, even referring thereto as "the most analogous case upon the subject," (Brief p. 22), and remarking that "the court will immediately observe the analogy between the two cases" (Brief p. 23).

As we read the *Lieberman* case, however, there appears no analogy whatever between that case and ours. We invite the Court's attention to some features of that case which seem to us to preclude any thought of analogy between the two cases.

In the first place, the only part of the New York Sanitary Code set out, is the section 66, which provides that no person shall sell milk without a permit. There is no showing as to what conditions or regulations were required for obtaining the permit, nor that conditions and regulations were omitted from the sanitary code so as to leave the granting of the permit to the mere will of the commission. No complaint was made in the Lieberman case as to the character of any conditions or regulations for the granting of the

permit, nor as to the absence of such conditions or regulations. The complaint seems to have been based upon the assumption that the Commission, having the power to grant permits, would act arbitrarily whether there were regulations or not.

But in the second place there is a still wider difference between the two cases. Going back to the report of the decision of the New York Court of Appeals, 175 N. Y. 440, we find that the sanitary code complained of did contain numerous detailed regulations governing the granting of such permits. Referring to the provisions of the code, the Court says:

> "It contains about 50 sections, among others, providing for the issuing of permits regulating the conduct of business and vending of food. It has at least 10 sections regulating, among other things, the quality of milk to be offered to the citizens and the details involved in the sale thereof."

The total absence from the Washington dental code of any regulation or restriction whatever regarding the examination of applicants, either as to matter, manner, extent, subjects, uniformity, records, or any other feature, at once differentiates it from the sanitary code referred to in the *Lieberman* case.

Conclusion

The record in this case shows that power without limitations is attempted to be given to the dental board in the examination of applicants for licenses to practice dentistry. No case has been called to our attention where similar grant of power has been upheld by this court. The *Yick Wo* case is an example of the many decisions of this Court where such attemtped grant of power has been denied. The District Court in this case in its decision reported in the Federal Reporter Vol. 274, p. 672, has followed the decisions of this Court, and we submit it in full harmony therewith and should be affirmed.

Respectfully submitted,

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